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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

CURTIS LEE JOHNSON,

Petitioner,

v.

JAMES SPALDING, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does an instruction which states:

> "A defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time the crime was committed.
>
> "When the State makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt.
>
> "After both the State and the defendant have submitted all of their proof the primary question is whether such defendant is guilty beyond a reasonable doubt. If, in considering all the evidence, including that touching the alibi, you have a reasonable doubt of the guilt of the accused, you should acquit and, if not, you should convict."

violate the Fourteenth Amendment Due Process Clause under the standard of *Cupp v. Naughten*, 414 U.S. 141 (1973) and *Engle v. Isaac*, ___ U.S. ___, 102 S.Ct. 887 (1982).

II. Should a district court reviewing a state criminal conviction under 28 U.S.C. § 2254 consider a series of trial errors which do not individually, prejudicially affect a constitutional right, under a cumulative error standard viewing the trial as a whole or only individually and in isolation?

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ARGUMENT

I. CERTIORARI IS INAPPROPRIATE TO REVIEW THE ALIBI JURY INSTRUCTION, BECAUSE THE JURY INSTRUCTION DID NOT SHIFT THE BURDEN OF PROOF TO THE PETITIONER.

Exactly who proposed the alibi jury instruction (jury instruction 13) is unclear. *State v. Johnson*, 19 Wn.App. 200, 574 P.2d 741 (1978), n. 1. The challenged jury instruction is quoted in full in respondents' Questions Presented No. I, *supra*.

An alibi defense is the presentation of evidence in an attempt to refute the state's evidence concerning the

essential element — the defendant's presence. The challenged instruction states the law of the "defense of alibi" as a rule affecting the evidentiary and procedural order of proof. The instruction does not compel the jury to first believe the state's evidence. It does not operate in effect to tell the jury, "before you can acquit the defendant by reason of his defense of alibi, you must first find that he has established it (by some evidentiary measure)." *Stump v. Bennett*, 398 F.2d 111, 119, n. 6 (8th Cir. 1968) *en banc*.

The contested second paragraph of the instruction begins with the placing of the burden of production and persuasion upon the state. The relevant language in the instruction is: "when the state makes out such a case as would sustain a verdict of guilty" (jury instruction 13). The instruction then describes the defendant's presentation as to his theory of the case to refute the state's case. However, the language does not require the jury to believe the prosecutor's theory until it is satisfied with the defendant's theory. The continuing notion that the prosecution must prove the elements is not interrupted by the language of incumbency, requirement, or similar compulsion such that defendant's failure to do as required accrues to the prosecution's benefit. The pertinent language is as follows: "*and the defendant offers* evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned." What verges on a burden in this language draws the jurors' attention to the question of whether the defendant produced sufficient evidence to put the particular fact of his presence in issue but defendant need not do anything — neither produce nor persuade the mind of the jury. Admittedly the instruction may create confusion or ambiguity but that is dispelled immediately in the closing paragraph, which clarifies any ambiguity by restating that the reasonable doubt standard was to be applied to all evidence, thereby, the instruction cured itself of any fault. *Wright v. Smith*, 569 F.2d 1188 (2d Cir. 1978) (curative language, in the instruction, reemphasizing state's burden of proof beyond reasonable doubt, eliminates error).

The sum of the instruction is that even if the jury

should determine that the defendant presented insufficient evidence of alibi or should disbelieve the evidence, the jury must weigh all the evidence submitted and should acquit if there is a reasonable doubt of guilt. Furthermore, the charge requires the state, not the defendant, to meet the reasonable doubt standard to convince the jurors of the defendant's presence and guilt of the crime. The alibi instruction, jury instruction 13, by its language neither shifts the burden of proof nor negates the explicit presumption of innocence charged by jury instruction 11.

The District Court applied the proper standard with regard to petitioner's claim, by looking at all the jury instructions as a whole, and not in isolation, under the standard enunciated in *Cupp v. Naughten*, 414 U.S. 141 (1973). *Johnson v. Spalding*, 510 F.Supp. 164, 167 (1981).

Many of the cases cited by the petitioner on alibi instructions are distinguishable in that the *Naughten* standard was not applied. Several other cases cited by petitioner are inapplicable in that the issue of the alibi instruction was presented to a federal court on direct appeal, rather than in a post-conviction collateral attack, that is, a habeas corpus action. The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of the state court's judgment is even greater than the showing required to show plain error on direct appeal. *Henderson v. Kibbe*, 431 U.S. 145 (1977).

The remainder of petitioner's authorities may be distinguished upon the facts. In the case of *Rogers v. Redman*, 457 F.Supp. 929 (D.C. Del. 1978), the jury instruction[1] in question posed the initial burden of proof

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[1] "Now, it is the defendant's burden to prove to your satisfaction the defense of alibi and the law reads that affirmative defense of alibi is established by a preponderance of the evidence when the jury is persuaded that the evidence makes it more likely than not that each element of the affirmative defense existed at the required time. Therefore, if you are convinced by a preponderance of the evidence that the Defendant, Will E. Rogers, was not present at the scene of the offense at the time they allegedly were committed, then you must return a verdict of not guilty."

upon petitioner Rogers to prove the defense of alibi by a preponderance of the evidence, unlike jury instruction 13, given in petitioner Johnson's trial, which merely required petitioner Johnson to produce evidence after the state had established a case which would sustain a verdict of guilty. *Rogers v. Redman, supra,* is further distinguishable on the grounds that the petitioner in that case properly objected during the course of trial to the alibi instruction, so as to enable the trial judge to correct his error and deliver an accurate charge. No objection was made to jury instruction 13 at petitioner Johnson's trial. It is the rare case in which an improper jury instruction will justify a reversal of a criminal conviction when no objection has been made in the trial court. *Henderson v. Kibbe, supra*; *Wright v. Smith,* 569 F.2d 1188 (2d Cir. 1978).

Petitioner also cites the case of *Graham v. Maryland,* 454 F.Supp. 643 (D. Md. 1978). Aside from being a poorly reasoned decision, in that the court held that the harmless error doctrine was inapplicable to alibi jury instructions, the published opinion in *Graham, id.,* does not even contain a copy of the jury instruction which it held unconstitutional. Thus, it is impossible for this Court to compare jury instruction 13 given in petitioner Johnson's trial with the jury instruction given in petitioner Graham's trial. This Court must not only consider the language used in jury instruction 13, it must consider jury instruction 13 along with all the other jury instructions as a whole. Further, the holding in *Graham, id.,* has been sharply criticized by the Maryland District Court in a later opinion, *Robertson v. Warden, Maryland Penitentiary, Collins,* 466 F.Supp. 262 (D. Md. 1979), *affirmed* 624 F.2d 1095 (4th Cir. 1980), *cert. denied* 101 S.Ct. 376, and the inherent prejudice finding of *Graham* was discredited.

To reiterate, petitioner has argued that the alibi instruction removed the prosecution's burden to produce evidence and persuade the jury as to the essential elements of the crime and place that requirement upon him. To assess this contention, this Court must look at all the instructions as a whole, not an isolated phrase or paragraph. *Cupp v. Naughten, supra.* Jury instruction 9,

as given at petitioner's trial, clearly states that the state must prove beyond a reasonable doubt all the elements of the crime, specifically the state must prove that the defendant "did cut, stab and wound the said Steven James McCoy with a knife;". Moreover, the court also instructed the jury that the defendant was innocent until proven guilty beyond a reasonable doubt, jury instruction 11. In addition, any possible confusion in jury instruction 13 with regard to the burden of the alibi defense was cured by defense counsel in closing argument. Throughout this case, petitioner's main argument has been that the language in jury instruction 13 could have possibly impermissibly confused the jury into believing that defendant had the burden of proof with regard to his alibi defense.

In defense counsel's closing argument, Mr. Schacht, one of petitioner's two defense attorneys, specifically addressed and explained the operation of jury instruction 13, the alibi instruction. (RP p. 8, line 15 through p. 9, line 4.) In his explanation of jury instruction 13, Mr. Schacht twice clarified to the jury that the burden of proof as to guilt *never* shifted to the defense. Mr. Schacht also reemphasized that the state had the burden to prove their case beyond a reasonable doubt.

More specifically, petitioner Johnson's defense counsel explained that the burden shifting language in jury instruction 13 related to the burden of coming forward with evidence, not the burden of proving innocence. When this latter explanation is read in the context of the language contained in jury instruction 13: "When the state makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi * * *," it is clear the burden of coming forward with evidence did not shift to the defendant until the state had proven him guilty beyond a reasonable doubt. In light of this explanation alone, it would be unreasonable for a court to conclude that the jury interpreted jury instruction 13 to shift the burden to the defendant to prove his innocence. In closing argument, petitioner's defense counsel cured any ambiguity which may have been contained in jury instruction 13.

Finally, in the last part of petitioner's defense attorney's closing argument, his counsel drove the point home that:

> "We do not have to prove anything. The state has that burden. It has never shifted. If they have not carried their burden, which I submit to you they have not, then you should return a verdict of not guilty." (RP Closing Argument p. 39, lines 24-28).

The jury at petitioner Johnson's trial never was led to believe that he had the burden to prove his innocence by means of the alibi defense. The jury was repeatedly advised that the burden never shifted to the defendant. Jury instruction 13 did not amount to constitutional error.

The language contained in the second paragraph of jury instruction 13 did not shift the burden of proof with regard to that alibi defense onto the petitioner. The continuing notion that the prosecution must prove the elements is not interrupted by language of incumbency, requirement or similar compulsion such that the defendant's failure to do as required accrues to the prosecutor's benefit.

This issue of an allegedly unconstitutional jury instruction, similar to the one given at petitioner's trial, that shifted the burden of proof as to an alibi defense onto the defendant has been argued in several federal circuit courts of appeal, unsuccessfully. *United States v. Fortes*, 619 F.2d 108 (1st Cir. 1980) (appeal); *United States v. Robinson*, 602 F.2d 760 (6th Cir. 1979) (appeal); *Hunter v. Williams*, 570 F.2d 510 (4th Cir. 1978) (habeas); *Wright v. Smith*, 569 F.2d 1188 (2d Cir. 1978) (habeas).

Any error contained in jury instruction 13, if any existed, was harmless error. Petitioner Johnson was identified by several eyewitnesses as the murderer. While the testimony of other witnesses contradicted this testimony and supported petitioner Johnson's alibi defense, there was substantial evidence to support the verdict of guilty and the jury's decision to convict petitioner was most certainly based upon the fact that they believed the state's witnesses and not petitioner's witnesses. It is not the function of federal habeas corpus

review to second guess the minds and perceptions of the jury at trial.

Both the District Court and the Ninth Circuit Court of Appeals reviewed the entire record in petitioner's case and determined that beyond question, petitioner had a fair trial and there was no real possibility that the jury was actually misled or that petitioner was in any way prejudiced by the alleged errors which he is now seeking to have this Court review.

Because no constitutional error occurred in the giving of the alibi jury instruction, jury instruction 13, this claim does not state grounds for relief in a federal habeas corpus proceeding. 28 U.S.C. § 2254. Accordingly, review by certiorari from this Court is unwarranted.

II. THE DISTRICT COURT GAVE PROPER CONSIDERATION TO PETITIONER'S CLAIMS OF NON-CONSTITUTIONAL ERROR.

Pursuant to 28 U.S.C. § 2254(a), a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court *only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.*

Accordingly, only claims of constitutional error are cognizable in a federal habeas corpus proceeding to review a state court conviction.

As noted by the District Court in its published opinion, *Johnson v. Spalding, supra* at 169-170, with regard to challenged jury instructions, jury instructions 13 and 14, the court applied the proper test of examining the jury instructions as a whole. See *Cupp v. Naughten, supra.*

In this case, petitioner alleged numerous trial errors occurred. However, as noted by the District Court, many of these errors did not implicate any constitutional protection. Rather, petitioner attempted to stack these non-constitutional errors so as to allege that a constitutional error occurred.

Judge Quackenbush, however, applied the proper standard of review when he noted:

> "An allegation of error not of constitutional proportion is, for habeas corpus purposes, foreclosed from further consideration except as it constitutes a fact of trial connected to the determination of prejudice after a determined constitutional error."

Thus, the District Court did consider the petitioner's allegations of non-constitutional error, but only in connection to prejudice from a determined constitutional error. As noted by the court, no constitutional error occurred in petitioner's trial. Any number of "almost errors, if not errors cannot constitute error." *Hammond v. United States*, 356 F.2d 931 (9th Cir. 1966).

Under the Due Process Clause of the Fourteenth Amendment, a criminal defendant is entitled to a fundamentally fair trial, but not a perfect trial. In every trial errors do occur. All trial court errors can be considered on direct appeal. However, only constitutional errors can be considered in a federal court habeas corpus review of a state court conviction. 28 U.S.C. § 2254(a).

In short, as noted in the District Court's opinion, *supra* at 169, non-constitutional errors are not considered as errors in a federal habeas corpus proceeding. Rather, they are considered as facts relating to prejudice with regard to constitutional errors.

Therefore, petitioner's argument that the District Court failed to consider the cumulative impact of non-constitutional errors is a *non sequitur* because by statute only constitutional errors can be considered by a federal habeas corpus court. 28 U.S.C. § 2254(a).

Again, as noted by the Ninth Circuit Court of Appeals, after reviewing the entire trial court record, beyond question Mr. Johnson had a fair trial and we see no real possibility that the jury was actually misled or that Mr. Johnson was in any way prejudiced by the alleged errors raised in this case.

For the foregoing reasons, respondents respectfully request that petitioner's petition for writ of certiorari be denied.

DATED this 24th day of September, 1982.

Respectfully submitted,

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